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No. 857

In the Supreme Court of the United States

OCTOBER TERM, 1957

EQUITABLE LIFE INSURANCE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

ARNOLD ORDMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

MORTON P. HOLT,
Associate General Counsel,

EDWARD P. WEIL,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.

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OPINIONS BELOW

The order of the court of appeals (Pet. 13–14) is not yet officially reported. The Board's decision and order in the unfair labor practice case are reported at 141 NLRB 718 (J.A. 2a–9a);[1] its decision in the related representation case is reported at 138 NLRB 529 (J.A. 9a–15a); and its supplemental decision is reported at 163 NLRB No. 28 (Pet. 27–31).

[1] "J.A." refers to the Joint Appendix filed in the court below.

317-808—68——1

JURISDICTION

The order of the court of appeals was entered on May 10, 1968 (Pet. 2). The petition for a writ of certiorari was filed on July 31, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the National Labor Relations Board acted reasonably in establishing a collective bargaining unit consisting of the insurance agents at the employer's two Cleveland offices and a sub-office at Lorain, Ohio.

2. Whether evidence concerning the union's motive in seeking the unit found to be appropriate by the Board was properly excluded.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition, p. 3.

STATEMENT

Petitioner is engaged in the sale of insurance in seven states and the District of Columbia (J.A. 10a; 26a). On January 11, 1962, the Union[2] petitioned the Board for certification as bargaining representative of insurance agents at the Company's two dis-

[2] Insurance Workers International Union, AFL-CIO.

In 1960 the Union lost an election for a state-wide unit of agents (J.A. 57a–62a). At that time it was Board policy that units of insurance agents less than state-wide or company-wide would not be established. That policy was reversed in *Quaker City Life Insurance Co.*, 134 NLRB 960, enforced, 319 F. 2d 690 (C.A. 4).

trict offices and one detached office in the metropolitan and suburban area of Cleveland, Ohio (J.A. 29a). Pursuant to Section 9(c)(1)(A) of the Act (29 U.S.C. 159(c)(1)(A)), a hearing was held on the petition, and the Board made the following findings:

The Company maintains numerous district offices throughout the seven state area. For administrative purposes, these offices are grouped in two divisions, each of which is headed by a division superintendent (J.A. 10a, 31a). Division II is composed of 16 district offices, 3 situated in Delaware and 13 in Ohio. The 13 Ohio offices are staffed by about 185 agents, 42 of whom work out of the offices involved herein (J.A. 10a; 30a–32a, 56a). Each district office services an assigned geographic area, and on occasion will have in its territory a "detached" office over which it exercises administrative control (J.A. 97a). There are two district offices in Cleveland, and a detached office at Lorain, some 28 miles from Cleveland, which is under the administrative control of the Cleveland West office (Pet. 22).[3]

Each district office is under the general supervision and direction of a district manager (J.A. 41a), who is directly responsible to his division superintendent (J.A. 11a; 32a). While a manager has no final authority to hire agents, he solicits applications when openings arise in his office, conducts personal interviews with the applicant, administers an aptitude test, and orders retail credit and medical reports on the ap-

[3] The nearest other district office is at Akron, Ohio, approximately 30 miles away from Cleveland (J.A. 11a; 84a).

plicant (J.A. 11a; 39a–42a). The manager thereafter forwards the application together with his recommendation to the home office and the manager's recommendation is followed over 70 percent of the time (J.A. 11a; 39a–40a, 46a–47a). New agents undergo a 13-week training course that is carefully supervised by the manager and he is thereafter responsible for conducting refresher courses and supervising the agents (J.A. 11a; 42a–43a; 73a).

Agents spend most of their time selling insurance in an assigned territory, but they are required to report to the district office three times weekly (or as often as the manager directs) to deposit premiums, turn in applications, and pick up mail (J.A. 11a; 32a–33a). Although a manager has no authority to discharge an agent, he investigates any complaints made about an agent's competence, handles grievances involving the agent, recommends discipline or discharge, and may order an audit of an agent's accounts (J.A. 11a; 46a, 48a–49a, 77a–78a, 70a–71a).

There is little or no interchange or transfer of agents among the various offices and the only business or social contact among agents is in the individual district office (J.A. 12a; 56a–57a). Except for ordinary life insurance, an agent must confine his sales to either his own or the district office's assigned area (J.A. 34a–35a).

Upon these facts, the Board found that the individual district office is a separate administrative entity, and therefore is inherently appropriate for purposes of collective bargaining (J.A. 12a). The

Board further found that geographic considerations, the absence of recent collective bargaining [illegible] and the fact that no union sought to repr[illegible] broader unit, justified grouping into one unit [illegible] district offices in Cleveland and the Lorain office [illegible] is administratively linked to the Cleveland West office (*ibid.*).[4] Accordingly, the Board directed an election in that unit, which the Union won, and it was certified (J.A. 13a–14a).

When petitioner refused to bargain with the Union, an unfair labor complaint issued, and the Board found that the Company had violated Section 8(a)(5) and (1) of the Act. The Board directed the Company to cease and desist from its unfair labor practice, to bargain with the Union upon request, and to post appropriate notices (J.A. 2a–3a, 6a).

The Company refused to comply with the Board's order, and the Board petitioned the court of appeals to enforce it. While the petition was pending, this Court decided *National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, in which it remanded a similar unit question to the Board for a further explication of its views. The court below thereupon remanded the instant case to the Board for further proceedings consistent with this Court's decision in *Metropolitan*.

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[4] At the hearing, petitioner sought to introduce evidence designed to show that the Union was motivated by the extent of its organization in requesting the unit which it did. The hearing officer excluded the evidence on the ground that the Union's motive was legally irrelevant. The Board sustained this ruling. (J.A. 97a–100a; 9a, n. 1.)

On remand the Board reaffirmed its initial decision and order. The Board found that petitioner's operations were essentially the same as those in *Metropolitan Life Insurance Co.*, 156 NLRB 1408, and *Western and Southern Life Insurance Co.*, 163 NLRB No. 14, enforced, 391 F. 2d 119 (C.A. 3), where it had reexamined and reaffirmed its conclusion that "the district office is the insurance industry's analogue of the single manufacturing plant, which the Act recognizes as presumptively appropriate" (Pet. 29). The Board further found that the two offices in Cleveland were appropriately grouped in one unit because of their geographic proximity, and that the Lorain office was also appropriately included since it was administratively part of the Cleveland West office (Pet. 30–31. The court of appeals enforced the Board's order. (Pet. 13–14.)

ARGUMENT

1. Petitioner's contention that the unit established by the Board was improper entails essentially an attack on the evidentiary support for the Board's findings of fact, which were sustained by the court of appeals. Such an evidentiary issue does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. At all events, the court below correctly sustained the Board's unit determination.[8]

[8] Section 9(b) of the Act empowers the Board to decide whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." In view of this broad grant of power, and the expertise involved in such determination, the Board's selec-

As shown in the Statement, the district manager exercises immediate supervisory authority over the agents assigned to his office; the sales force of each office operates in its own assigned territory; and there is virtually no interchange of agents among offices. The district manager recruits agent applicants and forwards their applications with his recommendation to the home office; his recommendation usually is followed. The manager conducts a training program for newly hired agents; may recommend the discharge of an agent; and may order the audit of an agent's account whenever he thinks it is necessary. These factors demonstrate that each district office is a separate administrative entity, and, as such, is an inherently appropriate unit. See *National Labor Relations Board* v. *Western & Southern Life Ins. Co.*, 391 F. 2d 119 (C.A. 3); *Corrie Corp. of Charleston* v. *National Labor Relations Board*, 375 F. 2d 149, 154–155 (C.A. 4); *National Labor Relations Board* v. *Quaker City Life Ins. Co.*, 319 F. 2d 690 (C.A. 4); *Metropolitan Life Insurance Co.*, 156 NLRB 1408. It is well established that a unit of two or more district offices may be an appropriate unit if there is a rational basis for grouping them. Here the grouping is supported by the fact that the two Cleveland offices are located in a separate and distinct geographical area,

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tion of an appropriate unit is not to be disturbed unless the agency has acted arbitrarily or capriciously (*Packard Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491–492), or has failed to articulate fully the basis for its determination (*National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438). The court below found that neither of these defects existed here.

namely, the City of Cleveland, and that the Lorain office is administratively linked to the Cleveland West office.

2. There is no substance to petitioner's contention (Pet. 10–12) that the Board erred in excluding evidence of the scope of the Union's organizational activities. The evidence which petitioner sought to introduce would show that the Union had only been successful in organizing the agents in the unit in question (n. 4, *supra*). But the fact that Section 9(c)(5) of the Act (Pet. 3) precludes the Board from giving controlling effect to the extent of union organization does not mean that the Board need reject an otherwise appropriate unit because the Union has confined its organizational activity to that unit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
EDWARD E. WALL,
Attorney,
National Labor Relations Board.

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